

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
3

4 NATURAL WELLNESS CENTERS OF  
5 AMERICA, INC.,

No. C 12-05586 CW

6 Plaintiff,

7 ORDER DENYING  
8 v.  
9 GOLDEN HEALTH PRODUCTS, INC., et  
al.,  
10 Defendants.

11 Defendants Golden Health Products, Inc. and Mary Faith Hunt  
12 move to dismiss for lack of personal jurisdiction or to transfer  
13 to the Central District of Illinois. Plaintiff Natural Wellness  
14 Centers of America, Inc. opposes the motion and requests in the  
15 alternative that the case be transferred to the Central District  
16 of California. Having considered all of the parties' submissions  
17 and oral argument, the Court denies Defendants' motion to dismiss  
18 or transfer and denies Plaintiff's alternative request to  
19 transfer.

20 BACKGROUND

21 Plaintiff is a nutritional supplements company based in  
22 Laguna Hills, California. Declaration of John R. Taylor ¶¶ 3-6.  
23 In 2002, it launched its "PRO-BIOTICS PLUS" dietary supplement and  
24 began marketing and selling the supplement under that mark through  
25 websites and other retail channels. Id. ¶ 6. The company  
26 obtained a certificate of registration, Registration No.  
27 2,767,607, from the U.S. Patent and Trademark Office (PTO) for the  
28 mark in September 2003. Id.

1       Defendant GHP is a nutritional supplements company based in  
2 Quincy, Illinois, that markets and sells its supplements over the  
3 internet. Declaration of Mary F. Hunt ¶¶ 2, 5. Its sole  
4 shareholder, director, and employee is Defendant Hunt, who  
5 operates the business out of her residence. Id. ¶ 4. GHP began  
6 selling certain supplements under the mark "Flora Probiotic Plus"  
7 in 2008. Id. ¶ 8. In February 2011, it obtained a certificate of  
8 registration for the mark, Registration No. 3,918,597, after the  
9 PTO "found no conflicting marks that would bar registration." Id.  
10 ¶¶ 12-14, Ex. A, PTO Records, at 2.

11       In November 2010, Plaintiff learned that Defendants were  
12 selling nutritional supplements under the "Flora Probiotic Plus"  
13 mark. Taylor Decl. ¶ 14. Believing that Defendants were  
14 infringing its "PRO-BIOTICS PLUS" mark, Plaintiff sent a cease-  
15 and-desist letter to one of Defendants' online retailers later  
16 that month. Id. The retailer responded that the mark belonged to  
17 one of its distributors and informed Defendants about Plaintiff's  
18 concerns. Id., Ex. 6.

19       On October 31, 2012, Plaintiff filed this action against  
20 Defendants alleging that they are infringing Plaintiff's "PRO-  
21 BIOTICS PLUS" mark. Docket No. 1, Compl. ¶ 1. On November 27,  
22 2012, Plaintiff requested that this case be transferred to the  
23 Central District of California in order to preempt Defendants'  
24 forthcoming request for a transfer to the Central District of  
25 Illinois. Three days later, on November 30, Defendants moved to  
26 dismiss Plaintiff's complaint or, in the alternative, to transfer  
27 the action to the Central District of Illinois.

## LEGAL STANDARD

## I. Personal Jurisdiction

Under Federal Rule of Civil Procedure 12(b)(2), a defendant may move to dismiss an action for lack of personal jurisdiction. The plaintiff then bears the burden of demonstrating that the court has jurisdiction. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004). To satisfy this burden, the plaintiff "need only demonstrate facts that if true would support jurisdiction over the defendant." Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995). Uncontroverted allegations in the complaint must be taken as true. AT & T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996). However, the court may not assume the truth of such allegations if they are contradicted by affidavit. Data Disc, Inc. v. Systems Tech. Assocs., Inc., 557 F.2d 1280, 1284 (9th Cir. 1977). If the plaintiff also submits admissible evidence, conflicts in the evidence must be resolved in the plaintiff's favor. AT & T, 94 F.3d at 588.

There are two independent limitations on a court's power to exercise personal jurisdiction over a non-resident defendant: the applicable state personal jurisdiction rule and constitutional principles of due process. Sher v. Johnson, 911 F.2d 1357, 1361 (9th Cir. 1990). Because California's jurisdictional statute is co-extensive with federal due process requirements, jurisdictional inquiries under state law and federal due process standards merge into one analysis. Rano v. Sipa Press, Inc., 987 F.2d 580, 587 (9th Cir. 1993). Under that analysis, the exercise of jurisdiction over a non-resident defendant will violate due process unless the defendant has established such "minimum

1 contacts" with the forum state that the exercise of jurisdiction  
2 "does not offend traditional notions of fair play and substantial  
3 justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

4 The court's exercise of personal jurisdiction may be either  
5 general or specific. General jurisdiction exists when the  
6 defendant maintains significant contacts with the forum state,  
7 even if the cause of action is unrelated to those contacts.

8 Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408,  
9 414 (1984). Specific jurisdiction, in contrast, exists when the  
10 cause of action arises out of the defendant's contacts with the  
11 forum state, even if those contacts are isolated and sporadic.  
12 Data Disc, 557 F.2d at 1287 (9th Cir. 1977).

## 13 II. Transfer of Venue

14 A district court may grant a discretionary change of venue  
15 pursuant to 28 U.S.C. § 1404(a), which provides: "For the  
16 convenience of parties and witnesses, in the interest of justice,  
17 a district court may transfer any civil action to any other  
18 district or division where it might have been brought." The  
19 statute identifies three basic factors for district courts to  
20 consider in determining whether a case should be transferred:  
21 (1) convenience of the parties; (2) convenience of the witnesses;  
22 and (3) the interests of justice. The Ninth Circuit has  
23 identified numerous additional factors a court may consider in  
24 determining whether a change of venue should be granted:

25 (1) the location where the relevant agreements were  
26 negotiated and executed, (2) the state that is most  
27 familiar with the governing law, (3) the plaintiff's  
28 choice of forum, (4) the respective parties' contacts  
with the forum, (5) the contacts relating to the  
plaintiff's cause of action in the chosen forum, (6) the  
differences in the costs of litigation in the two

1 forums, (7) the availability of compulsory process to  
2 compel attendance of unwilling non-party witnesses, and  
3 (8) the ease of access to sources of proof.

4 Jones v. GNC Franchising Inc., 211 F.3d 495, 498-99 (9th Cir.  
5 2000).

6 The burden is on the movant to show that the convenience of  
7 parties and witnesses and the interests of justice require  
8 transfer to another district. Commodity Futures Trading Comm'n v.  
9 Savage, 611 F.2d 270, 279 (9th Cir. 1979). The Supreme Court has  
10 ruled that the § 1404(a) analysis should be an "individualized,  
11 case-by-case consideration of convenience and fairness." Van  
12 Dusen v. Barrack, 376 U.S. 612, 622 (1964).

#### DISCUSSION

##### I. Personal Jurisdiction

1 Defendants contend that their contacts with California are  
2 too tenuous to support personal jurisdiction in this forum. Hunt  
3 highlights the fact that she resides and operates GHP in Illinois,  
4 where the company is incorporated. Hunt Decl. ¶¶ 19-20. She has  
5 never registered GHP as a foreign corporation in California or  
6 designated an agent for service of process there. Id.  
7 Furthermore, neither she nor GHP owns or leases any property in  
8 California. Id. ¶¶ 16-17. Hunt asserts that she has never  
9 travelled to California for business, used the California court  
10 system (outside of this case), or operated any facilities --  
11 whether for GHP or any other company -- in California. Id. ¶¶ 18,  
12 27-28.

13 Defendants' sole contact with California residents is through  
14 GHP's websites, which are "equally accessible to all residents of  
15 the United States and to persons worldwide." Id. ¶¶ 25-26. GHP  
16

1 accepts orders through these sites and ships its products to  
2 customers around the country, including in California. Id.  
3 ¶¶ 29-30. Hunt estimates that fourteen percent of GHP's customers  
4 reside in California and that sales to these customers have  
5 generated roughly \$191,000 in total revenue since April 2008. Id.  
6 ¶ 30. Plaintiff contends that this online commercial activity  
7 supports both general and specific jurisdiction in California.

8       A. General Jurisdiction

9           A defendant implicitly consents to personal jurisdiction in a  
10 foreign state by undertaking "continuous and systematic"  
11 activities within that state. Insurance Corp. of Ireland, Ltd. v.  
12 Compagnie des Bauxites de Guinee, 456 U.S. 694, 703-04 (1982).  
13 Here, Plaintiff argues that Defendants consented to this Court's  
14 jurisdiction by marketing and selling their products to California  
15 residents through their websites.

16           The Ninth Circuit rejected this argument in CollegeSource,  
17 Inc. v. AcademyOne, Inc., 653 F.3d 1066, 1075-76 (9th Cir. 2011).<sup>1</sup>  
18 There, the court held that the mere maintenance of an interactive  
19 website is insufficient to support general jurisdiction over a  
20 foreign defendant, even if residents of the forum state visit the  
21 website and make purchases through it. Id. at 1075-76. The court  
22 reasoned, "If the maintenance of an interactive website were  
23 sufficient to support general jurisdiction in every forum in which  
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25           <sup>1</sup> Plaintiff recently made the same argument in another case in this  
26 district. The court, relying on CollegeSource, rejected the argument.  
27 Natural Wellness Ctrs., Inc. v. J.R. Andorin, Inc., 2012 WL 216578, at  
\*4 (N.D. Cal.) ("The maintenance of an interactive business website that  
can be accessed by California residents is not sufficient to support  
general jurisdiction.").

1 users interacted with the website, 'the eventual demise of all  
2 restrictions on the personal jurisdiction of state courts' would  
3 be the inevitable result." Id. (citations omitted).

4 Although CollegeSource recognized that a defendant could be  
5 subject to general jurisdiction in a foreign court if its website  
6 generated "substantial and continuous commerce with the forum,"  
7 id. at 1075, Defendants' online activities do not meet this  
8 standard. Their website has generated less than \$191,000 in  
9 California sales revenue over the past four and a half years -- an  
10 average of roughly \$3400 per month. These sales constitute less  
11 than fifteen percent of Defendants' total product sales. What's  
12 more, these sales have not prompted Defendants to travel to  
13 California, send sales agents there, or tailor their marketing  
14 towards the state in any way. Past Supreme Court and Ninth  
15 Circuit decisions make clear that Defendants' activities are  
16 insufficient to support general jurisdiction. Cf. Keeton v.  
17 Hustler Magazine, Inc., 465 U.S. 770, 772, 779 & n.11 (1984)  
18 (finding no general jurisdiction despite defendant's circulation  
19 of 10,000-15,000 magazine sales in the forum state every month);  
20 Congoleum Corp. v. DLW Aktiengesellschaft, 729 F.2d 1240, 1242  
21 (9th Cir. 1984) (refusing to find general jurisdiction even when  
22 defendants' forum-state activities included soliciting orders,  
23 promoting products to potential customers through the mail,  
24 maintaining a showroom display, and attending trade shows and  
25 sales meetings).

26       B.     Specific Jurisdiction

27       Courts in this circuit use a three-prong test to determine  
28 whether they may assert specific jurisdiction in a particular

1 case: (1) the foreign defendant must purposefully direct its  
2 activities or consummate some transaction with the forum or a  
3 resident thereof, or perform some act by which it purposefully  
4 avails itself of the privilege of conducting business in the  
5 forum, thereby invoking the benefits and protections of its laws;  
6 (2) the claim must be one which arises out of or results from the  
7 defendant's forum-related activities; and (3) the exercise of  
8 jurisdiction must be reasonable. Lake v. Lake, 817 F.2d 1416,  
9 1421 (9th Cir. 1987). Each of these conditions must be satisfied  
10 to assert jurisdiction. Insurance Co. of N. Am. v. Marina Salina  
11 Cruz, 649 F.2d 1266, 1270 (9th Cir. 1981).

12       1. Purposeful Direction or Availment

13       The Ninth Circuit relies on a "sliding scale analysis" to  
14 determine whether a defendant's online activities constitute  
15 "purposeful direction or availment." Boschetto v. Hansing, 539  
16 F.3d 1011, 1018 (9th Cir. 2008). Under that analysis, the court  
17 examines "the 'level of interactivity and commercial nature of the  
18 exchange of information that occurs on the [defendant's] Web site'  
19 to determine if sufficient contacts exist to warrant the exercise  
20 of jurisdiction." Cybersell, Inc. v. Cybersell, Inc., 130 F.3d  
21 414, 418 (9th Cir. 1997) (citations omitted). A defendant who  
22 merely maintains a "passive website" and does "nothing to  
23 encourage residents of the forum state to access [the] site" will  
24 not be subject to jurisdiction on that basis. Rio Properties,  
25 Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1020 (9th Cir. 2000).  
26 Rather, the plaintiff must show "'something more' to indicate that  
27 the defendant purposefully (albeit electronically) directed his  
28 activity in a substantial way to the forum state." Cybersell, 130

1 F.3d at 418; see also Pebble Beach Co. v. Caddy, 453 F.3d 1151,  
2 1156 (9th Cir. 2006) (requiring "something more" than a passive  
3 website to confer specific jurisdiction in a trademark  
4 infringement action).

5 District courts in this circuit have generally found that  
6 online product sales to residents of the forum are sufficient to  
7 satisfy this "something more" requirement in trademark  
8 infringement cases. See, e.g., Vanity.com, Inc. v. Vanity Shop of  
9 Grand Forks, Inc., 2012 WL 4755041, \*4 (N.D. Cal.) ("Vanity Shop  
10 argues that merely selling to California customers via its website  
11 is insufficient to confer personal jurisdiction. The Court  
12 disagrees."); Smith Enter., Inc. v. Capital City Firearms, 2008 WL  
13 2561882, at \*5 (D. Ariz.) (finding purposeful direction where  
14 "Defendant maintained an interactive website and consummated over  
15 100 sales" with residents of the forum state); Salu, Inc. v.  
16 Original Skin Store, 2008 WL 3863434, at \*5 (E.D. Cal.)  
17 ("[Defendant's] sales to California customers . . . constituted  
18 approximately 14% of its total business. As such, defendant  
19 intentionally engaged in commercial transactions with California  
20 residents.").<sup>2</sup> These courts all concluded that the defendant was  
21 subject to personal jurisdiction in the forum even though online  
22 sales to residents of the forum made up a relatively small share  
23 of the defendant's business.

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25 <sup>2</sup> One of the only cases to reach a different conclusion was the  
26 case that Plaintiff brought in this district last year. See Natural  
27 Wellness, 2012 WL 216578, at \*7 (holding that the defendant's "use of  
interactive websites is not sufficient to subject [it] to personal  
jurisdiction in California"). Nevertheless, the court in that case  
28 found other grounds to support specific jurisdiction. Id.

1       Here, Defendants concede that California residents make up  
2 fourteen percent of their customers and that California sales  
3 constitute sixteen percent of their revenue. This is more than  
4 enough to satisfy the purposeful direction prong. Cf. Vanity.com,  
5 2012 WL 4755041, at \*3 (finding specific jurisdiction where  
6 defendant's online sales to forum state made up "approximately  
7 0.02% of [] total sales"); Smith Enter., 2008 WL 2561882, at \*2  
8 ("2.75% of Defendant's total revenues"); Salu, 2008 WL 3863434, at  
9 \*5 ("14% of [defendant's] total business"); Starlight Int'l, Ltd.  
10 v. Lifeguard Health, LLC, 2008 WL 2899903, at \*2 (N.D. Cal.)  
11 ("0.24% of sales").

12           2. Arising from Defendants' Forum-Related Activities

13       To determine whether the plaintiff's claims arise from the  
14 defendant's forum-related activities -- the second prong of the  
15 specific jurisdiction test -- courts use a traditional "but for"  
16 causation analysis. Bancroft & Masters, Inc. v. Augusta Nat'l,  
17 Inc., 223 F.3d 1082, 1088 (9th Cir. 2000). The Ninth Circuit has  
18 recognized that, in trademark infringement actions, if the  
19 defendant's infringing conduct harms the plaintiff in the forum  
20 state, this element is satisfied. Panavision, 141 F.3d at 1322;  
21 see also Vanity.com, 2012 WL 4755041, at \*4 ("[Plaintiff]'s claims  
22 arise out of defendant's forum-related activities because  
23 [defendant]'s dealings with California customers enable it to  
24 profit from its alleged [trademark infringement].").

25       Here, Plaintiff alleges that Defendants' alleged infringement  
26 led to sales in California that ultimately harmed Plaintiff's  
27 business there. This allegation satisfies the second element of  
28 specific jurisdiction.

## 1                   3. Reasonableness

2                   If the court finds that the first two elements of specific  
3 jurisdiction are satisfied, the defendant may escape the court's  
4 jurisdiction only by showing that other considerations would  
5 render jurisdiction unreasonable. Dole Foods Co., Inc. v. Watts,  
6 303 F.3d 1104, 1114 (9th Cir. 2002) (citing Burger King Corp. v.  
7 Rudzewicz, 471 U.S. 462, 477 (1985)). To evaluate reasonableness,  
8 courts consider several factors, including the potential burden on  
9 the defendant, possible conflicts of law, the forum state's  
10 interest in adjudicating the dispute, and various other factors to  
11 "illuminate the considerations of fairness and due process."  
12 Hedrick v. Daiko Shoji Co., Ltd., 715 F.2d 1355, 1359 (9th Cir.  
13 1983).

14                  Defendants have not shown that this Court's exercise of  
15 jurisdiction would be unreasonable here. Courts in this district  
16 have generally found it reasonable to exercise jurisdiction over a  
17 foreign defendant on claims arising from that defendant's  
18 commercial activity in California. See, e.g., Vanity.com, 2012 WL  
19 4755041, at \*4 ("[B]ecause Vanity Shop has purposefully injected  
20 itself in the stream of commerce in California, exercise of  
21 specific jurisdiction comports with fair play and substantial  
22 justice."); Starlight Int'l, 2008 WL 2899903, at \*7 ("As  
23 [defendant] has not presented a compelling reason to ignore  
24 California's legitimate interest in protecting against alleged  
25 violations of a trademark registered to a California company,  
26 through products sold to Californians, this factor must swing in  
27 [plaintiff]'s favor."). Thus, Defendants' sales to California

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1 customers support specific jurisdiction over Plaintiff's trademark  
2 infringement claims.

3 II. Transfer of Venue

4 A. Defendants' Request for Transfer

5 Defendants have not established that the Central District of  
6 Illinois is a more convenient forum for litigating this dispute.  
7 Although Defendants note that two of their non-party witnesses  
8 would benefit from a transfer, they fail to explain adequately how  
9 these witnesses' testimony is material to this dispute. See  
10 Cochran v. NYP Holdings, Inc., 58 F. Supp. 2d 1113, 1119 (C.D.  
11 Cal. 1998) ("[T]he moving party must demonstrate, through  
12 affidavits or declarations containing admissible evidence, who the  
13 key witnesses will be and what their testimony will generally  
14 include." (emphasis added)). Moreover, they ignore the fact that  
15 Plaintiff's witnesses, who reside in Southern California, would be  
16 significantly inconvenienced if this case were transferred to an  
17 Illinois court. Accordingly, Defendants' convenience argument  
18 does not support a transfer here. See Decker Coal Co. v.  
19 Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986)  
20 (upholding denial of the transfer request where transfer would  
21 "merely shift rather than eliminate the inconvenience").

22 Defendants' argument that the interests of justice weigh in  
23 favor of transfer here because of judicial vacancies in this  
24 district is similarly unavailing. The First Circuit has  
25 specifically rejected this argument in the past, reasoning that  
26 "[n]either constitutional nor statutory rights of parties are  
27 suspended when there are judicial vacancies in a district." Coady  
28 v. Ashcraft & Gerel, 223 F.3d 1, 11 (1st Cir. 2000) ("While

1 expressions of concern that the President and Congress fill  
2 existing judicial vacancies are appropriate in other contexts, it  
3 has no place in determining the rights of litigants under 28  
4 U.S.C. § 1404(a), and is not 'in the interest of justice.'"  
5 (citations omitted)).

6 B. Plaintiff's Request for Transfer

7 Plaintiff only requested a transfer in the hopes of  
8 forestalling a transfer to the Central District of Illinois.  
9 Because Defendants' request to transfer to that district is  
10 denied, Plaintiff's motion is denied as moot.

11 CONCLUSION

12 For the reasons set forth above, the Court DENIES Defendants'  
13 motion to dismiss or transfer (Docket Nos. 19 & 20) and DENIES  
14 Plaintiff's request to transfer (Docket No. 10). Defendants'  
15 motion to strike Plaintiff's supporting declarations (Docket No.  
16 32) is also DENIED because the Court does not rely on any of  
17 statements to which Defendants object. In the future, all  
18 evidentiary objections should be raised in the parties' briefs,  
19 pursuant to Civil Local Rule 7-3.

20 IT IS SO ORDERED.

21  
22 Dated: 1/22/2013

  
23 CLAUDIA WILKEN  
24 United States District Judge  
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